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IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM T. WATSON,

Petitioner,

v.

M. W. KELLOGG COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does Section 8.01-250 Va. Code Ann. (Virginia's Statute of Repose, immunizing Architects, Engineers, Countractors and others from liability five years after improvements to Real Estate are completed) violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

II. Does Section 8.01-250 Va. Code Ann. violate the dure process clause of the Fourteenth Amendment of the Constitution of the United States?

LIST OF ALL PARTIES

The Petitioner is William T. Watson.

The Sole Respondent is M. W. Kellogg Company.

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OPINIONS BELOW

The United States Court of Appeals issued an unpublished opinion which is included in the Appendix (p. 1.)

The United States District Court for the Eastern District of Virginia issued an oral report, the transcript of which is available.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Judgment sought to be reviewed was entered September 6, 1983, by the United States Court of Appeals for the Fourth Circuit .

No rehearing nor extention for filing was sought.

This Court has jurisdiction because both issues are whether a Virginia State Statute

violates the United States Constitution. Jurisdiction is based upon 28 USCA 1254 and Article III, Section 2 the Constitution of the United States.

THE CONSTITUTIONAL PROVISIONS AND STATUTES IN QUESTION

ARTICLE XIV

Section 1

..."No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The State Statute in question is Section 8.01-250 Va. Code Ann.

Section 8.01-250. Limitation on certain actions for damages arising out of

defective or unsafe condition of improvements to real property. - No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought, rather each such action shall be brought within the time next after such injury occurs as provided in Sections 8.01-243 and 8.01-246. (Code 1950, Section 8.24.2; 1964, c. 333; 1968, c. 103; 1973, c. 247)

STATEMENT OF THE CASE

William T. Watson was employed by Allied Chemical Corporation at its Hopewell plant,

for thirty-three years. On November 20, 1979, a serious liquid ammonia spill occurred. Watson was doused with both liquid and gaseous ammonia in this accident. Watson survived, but he is permanently, totally disabled; among other injuries suffered, Watson was made "industrially blind" and his lungs have been so destroyed that he requires nearly constant use of oxygen equipment merely to breathe. His incurred and anticipated "special damages" exceed $500,000.00.

The ammonia spill occurred in the Kellogg 1000 tons per stream day ammonia plant, whick is a section of Allied's over-all chemical plant in Hopewell, Virginia. The entire "Kellogg plant" was designed and built by the defendant, M. W. Kellogg Company. M. W. Kellogg is a Texas-based chemical plant and refinery construction giant. Kellogg has built over one hundred 1000 T.P.S.D.

ammonia plants across the world, yet is best known for the construction of refineries.

Watson filed suit against M. W. Kellogg Company in the Circuit Court of the City of Richmond, Division I. On September 10, 1981, defendants removed the case to the United States District Court on the basis of diversity of citizenship.

Watson's suit was filed in counts and alleged among other things that Kellogg was liable for negligence, breach of warranty, and failure to warn of an unsfae or defective condition. Specifically, Watson alleged and proved through three days of trial before a jury that Kellogg had designed and built a plant with a number of defects which had caused his injury. The defects included venting of relief lines over the heads of employees and a liquid level indicator which would "stick" and

yet, had no back up warning system. On the day of the accident the warning indicator was out of service, so that a tank over-pressured and liquid ammonia was forced out of the overhead relief line and onto Watson.

Kellogg raised as its third defense that the plaintiff's cuase of action was barred by the statute of limitations, meaning Section 8.01-250 Va. Code Ann.

On the morning of the first day of trial, Kellogg made a motion for summary judgment claiming that Watson's action was barred by Section 8.01-250, Va. Code Ann., the five year statute of repose. That motion was renewed as a joint motion for summary judgment and directed verdict at the conclusion of the plaintiff's evidence two and one-half days later. The Court heard argument on the matter and sustained the defendant's motion. Thereafter, Watson unsuccessfully appealled to The United

States Court of Appeals for the Fourth Circuit whose opinion is in the Appendix (p. 1).

JURISDICTION BELOW AND HOW ISSUES WERE PRESENTED

The suit was removed from the State trial Court to the United States District Court by Respondent (who was the defendant below) on diversity grounds.

At the end of the Petitioner's (then plaintiff's) case Respondent moved for Summary Judgment and directed verdict based upon Section 8-01-250 Va. Code Ann. Petitioner argued that the statute was unconstitutional on a variety of grounds including both Equal Protection and Due Process (see Appendix, opinion of United States District Court, original pages Nos. 348 through 384, in particular p. 371 and 375)

These issues were raised in greatest detail in the United States Court of Appeals

for Fourth Circuit.

ARGUMENT

The protection of the constitutional plaintiffs in civil litigation is a matter of increasing concern and emphasis across the country.[1] In the last few years, a wave of special privilege legislation has swept the country, resulting in special privileges for the medical profession, architects and other already privileged groups. The new statutes largely serve to immunize these groups from the results of their own negligence at the expense of those who are injured by that negligence. This is such a case. Tom Watson was horribly injured because of the

[1] See H. Philo, "Tort Trials, Over-Due Process of Law," Trial Vol. 19, No. 11, November 1983, for example

negligent design of a chemical plant be such and be made whole but found his recovery thwarted by Virginia's Statute of Repose Section 8-01-250, Va. Code Ann.

Statutes of Repose such as Virginia's have been the focut of much recent constitutional litigation. A much publicized case in New Hampshire, Heath v. Sears Roebuck & Co. (1983), held such a statute unconstitutuional. In doing so New Hampshire joined a growing list of States finding these statutes unconstitutional on a variety of State and Federal constitutional grounds; see City of Norman v. Liddell, 596 p.2d 879 (Okla. 1973); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Lankford v. Sullivan, Long & Haggerty, 416 So.2d 996 (Ala., 1982); Skinner v. Anderson, 38 Ill.2d 455, 231 N.E. 2d 588 (1967); Overland Construction Company v. Sirmons, 369 So.2d 572 (Fla., 1979).

Pacific Indemnity Co. v. Thompson-Poeger Inc., 260 N.W.2d 548 (Minn., 1977); Phillips v. A. B.C. Builders, Inc., 611 P.2d 821 (Wyo., 1980); Fujioka v. Kam, 55 Hawaii 7, 514 P.2d (1973); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) Kallas v. Millwork Corp., v. Square D. Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

The opinion of the United States Court of Appeals for the Fourth Circuit is contrary to these cases indicating a considerably and important division in the country concerning the Statute of Repose which needs to be settled by this Court.

This division is stated clearily by the United States Court of Appeals for the Ninth Circuit in Jasinski v. Showboard Operating Co., 644 F.2d 1277, (9th Cir. 1981) - Footnote 7 states:

> "The constitutional arguments raised by Showboat Hotel on appeal are are neither insubstantial nor obscure. Constitutional attacks upon similar statutes have been considered in at

least 18 jurisdictions, and have met with success in about half." Citations omitted.

The opinion of the United States Court of Appeals for the Fourth Circuit fails to address the intermediate standard of care and whether or not it should apply here. This is also an issue of major importance on which differences exist among the Courts of last resort of the various states.

For these reasons listed in compliance with Rule 17 of the Rules of the United States Supreme Court and their petition for certiorari should be granted.

ISSUE NO. I. Does Section 8.01-250, Va. Code Ann, violate the equal protection clause of the Fourteenth amendment of the Constitution of the United States?

Any evaluation of the equal protection argument must begin with some examination of the classifications that are made by the legislation under attack, Section 8.01-250

Va. Code Ann., makes at least the following classifications:

A. Persons performing or furnishing the design, planning, surveying, supervision of construction, or construction of improvements to real property, are distinguished from those who perform other services relating to improvements to real property.

B. Those who design, plan, survey, construct or supervise construction of items which are not improvements to real property, are distinguished from those who provide those same services for improvements to real property.

C. Those who have suits against persons furnishing the design, planning, surveying, supervision of construction or construction of improvements to real property, not involving injuries to property, personal

injury or wrongful death are separated from those who have causes of action against these same persons for injury to property, real or personal arising out of the same work, or for bodily injury or wringful death.

D. Manufacturers or suppliers of equipment or machinery or other articles installed in a structure upon real property are distinguished from those persons otherwise designing, planning, surveying, or constructing improvements to real property.

E. Those persons manufacturing or supplying items other than equipment, machinery or"other articles" installed in a structure upon real property are immuned, whereas those who manufacture or supply equipment or machinery or other articles installed in a structure upon real property are not.

F. Those in actual possession and

control are not immune, i.e. Tenant sometimes, although those in control but not in possession are immune, i.e. Landlord absentee and those in possession but not in control, i.e. Tenant at other times immune.

G. Victims such as William T. Watson, who are injured under situations giving rise to what is commonly called a products liability suit arising out of the defective or unsafe condition of anything but an improvement to real property (for example a car) have a cuase of action; those whose injury arises out of an improvement to real property and would lie against the person furnishing the design, planning, surveying, supervision of construction or construction of such improvement have no cause of action.

The occupant of an apartment might be liable in a products liability suit for a defect in his premises under Section 8.01-250

Va. Code Ann. while the man who designed and built that defective and dangerous condition is completely immune from that suit, see generally Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

H. Finally, persons situated such as William T. Watson are totally barred from any remedy, while virtually every other person injured by the fault of another has some form of redress at law.

With those and may other possible classifications in mind the question in any equal protection analysis becomes what standard of evaluation should The Court use? Until the early 1970's The Court had developed a well recognized, two-tier approach to equal protection questions. Under this approach, courts would either evaluate legislative classifications using "strict scrutiny" standard or a "rational

basis" test. The more stringent, strict scrutiny standard, requires that the legislation be necessary to the promotion of a compelling state interest and is employed when a statute contains a "suspect" classification, or limits a so-called "fundamental right", Shapiro v. Thompson, 394 U.S. 618 (1969).

Classifications are considered suspect when they involve race, creed, color, or national origin. San Antonia Independent School District v. Rodriquez, 411 U.S. 1 (1973). The courts also employ a strict analysis if a fundamental right is affected, even if the classification is not directed at a suspect class. The Supreme Court has limited the "fundamental rights" category to the rights explicity or implicity guaranteed by the Constitution. Plaintiffs recognize it as clear that the plaintiff,

William T. Watson, is not a member of a "suspect class". The general consensus of authority appears to be that Watson's right to recover for the wrongful injury to him does not fall within those rights explicitly or implicitly guaranteed by the Constitution, Carr v. United States, 422 F.2d 1007 (4th Cir. 1970). Such discrimination against the severely injured victim closely resembles the discrimination that affects the enjoyment of a fundamental right, however, since the right to full compensation for an injury is an important substantive right right. Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Jones v. State Board of Medicine, 97 Idaho 559, 555 P.2d 399 (1976); Honte v. North Mason School District, 85 Wash. 2d 810, 539 P.2d 845 (1975); Brisco Company v. Rutgers, 130 N.J. Super, 493, 327 A.2d 687 (1974). In fact

Wilson v. Iseminger, 185 U.S. 55 (1902) held that a statute of limitations could not be allowed to bar a right of action before it accrued.

The courts in the early 70's were faced with a delimma under the two tier approach. If a classification did not involve suspect groups or rights delineated as fundamental, then the courts had no effective tool to use to protect the citizenry from legislative abuses. The act under review here is a classic example of the problem. The legislature has taken away Watson's right to obtain redress for a harm done to him, and have substituted nothing of benefit to him in return.

Reacting to this delimma The Court began utilizing an intermediate approach in equal protection analysis. This intermediate approach was first enunciatedin

Reed v. Reed, 404 U.S. 71, (1971). It can also be found in Eisenstadt v. Baird, 405 U.S. 438 (1972), Citing F.S. Royster Guano Company v. Virginia, 253 U.S. 412 (1920), The Reed Court stated:

> "The equal protection clause of the amendment does, however, deny to the state the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" 404 U.S. at 75-79.

The oft repeated quote from F. S. Royster Guana Company v. Virginia, 253 U.S. 412, 415 (1920), was repeated recently in Plyler v. Doe, 457 U.S. 217 In Plyler, the State of Texas had denied illegal aliens the right to a public

education. The Court held that Texas was required to supply public education to these people. The Court stated:

> "In applying the equal protection clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.
>
> "But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The equal protection clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a suspect class or that impinge upon the exercise of a fundamental right . . . In addition we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulty; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the idea of equal protection, by inquiring whether it may fairly be viewed as furthering a substantial interest of the state".

Plyler, Supra

The Court then cites in a footnote Craig v. Boran, 439 U.S. 190 (1976); Lalli v. Lalli, 439 U.S. 259 (1978), and states as follows:

> "This technique of (intermediate) scrutiny permits us to evaluate the rationality of legislative judgment with reference to well settled constitutional principles 'in expounding the Constitution, the court's role is to discern principles sufficiently absolute to give them roots throughout the community in continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place'". University of California Regents v. Bacche, 438 U.S. 265, 299 (1978), (which in itself was quoted from Archibald Cox).

The Court then examined the factual situation presented to it in Plyler and determined that public education, while not a right granted by the Constitution, is also not merely some governmental benefit indistinguishable from other

forms of social welfare legislation. The denial of the right to public education therefore denied plaintiffs equal protection of the laws. In support of its holding The Court stated that the American people have always regarded education and acquisition of knowledge as matters of supreme importance and relied heavily on the fact that public education provides the basic tools by which individuals are able to lead economically productive lives. The Court pointed out that there are significant social costs borne by the nation when selected groups are denied means to absorb the value of public education.

Likewise, the American people have always considered access to the courts and the right to trial by jury to redress

the wrongs done to one person by another as matters of supreme importance. Barring someone as critically injured as William T. Watson from any cause of action certainly denies him the ability to recover economically the loss he suffered through the fault of the defendants, and he is thrown upon the resources of the nation (in this case through workman's compensation; in other cases it could be public welfare medicaid, Social Security, or nothing at all)so that there is a significant social cost borne by the nation. Watson's right of access to courts and right to sue or obtain some remedy to redress his wrong is as basic as the right to free public education, it may be of even higher dignity, and deserves the same protection.

In light of these high costs, the

legislative classifications must be justified by some substantial goal of the state. In the Plyler Case a number of indentifiable policies were asserted against illegal aliens' opportunity for an education. These included preservation of the state's limited resources for the education of its lawful residents; protection of the state from an influx of illegal immigrants; erosion of the quality of the education offered by the state; and that the undocumented nature of the alien children renders them less likely than other children to remain within the boundaries of the state and put their education to productive social or political use within the state. All of these justifications were found wanting.

At least the first justification, protection of the state's limited funds

for educational resources, is certainly a stronger justification than can be asserted for Section 8.01-250. Va. Code Ann. Very little justification of any sort can be found for Section 8.01-250. At best it is designed to protect the pocketbooks of an arbitrarily selected and limited class of generally professional men involved in real estate construction. In Plyler, the state was found to have an evidentiary burden to establish the justification for its limitation, and the evidence was not in the record to do so. Likewise, the present record is devoid of any evidence establishing suitable justification, indeed, devoid of evidence providing any justification for Section 8.01-250.

The intermediate approach accords the legislation more flexibility than does the strict scrutiny test, but it requires

the state to provide a greater justification for its classification than is required by the rational basis test. Courts using this intermediate standard carefully appraise the factual assumptions that underline the asserted connection between the legislative means and ends. Under the old rational basis test, virtually any real or imagined set of facts would serve to justify legislation. It was in reality no test at all, but a carte blanche handed to the legislature to do whatever it pleased. The intermediate standard is the judicial reaction to The Courts distate at rubber stamping everything a legislature did.

In a number of states statutes of repose of this nature have been held to violate equal protection. Broome v. Truluck,

270 S.C. 227, 241 S.E.2d 739 (1978) held a ten year statute of repose unconstitutional on equal protection grounds. The statute there contained language almost identical to Virginia's except that it was keyed to the substantial completion of a project. The Supreme Court of South Carolina found that the purpose was the grant of immunity to architects, engineers and contractors in the real estate construction industry. It found that the General Assembly had power to classify but that Constitution required all members of a class to be treated alike under similar circumstances and conditions, and that any classification not be arbitrary, but bear reasonable relationship to the purpose of the legislation. In short it utilized an intermediate level of scrutiny, and found the law lacked a sound basis for the grant of

immunity.

In North Carolina in Bolick v. American Barmag Corp., 284 S.E.2d 188 (N.C. App. 1981) the intermediate court in North Carolina likewise held the act unconstitutional as denial of right of access to the courts. That decision was appealed to the North Carolina Supreme Court which held that the statute was inapplicable to that case. Bolick v. American Barmag, Corp., 293 S.E.2d 415 (N.C. 1982).

The Virginia statute was modeled upon Wisconsin's, which was held to be unconstitutional in Kallas Millwork Corp. v. Square D Company, 66 Wis.2d 382, 225 N.W. 2d 454 (1975) on equal protection grounds[4],

A number of cases have found that equal protection demanded a quid pro quo

be given to the would be plaintiff for the loss of his right to sue. A decision of this nature is Overland Construction Company v. Sirmons, 369 So.2d 572 (Fla. 1979).

The matter has been passed on in Virginia only once, in Smith v. Allen Bradley Company, 371 F.Supp. 698 (W.D. Va. 1974). That case, as is true of most cases upholding the constitutionality of these statutes, contains only a very conclusory review of the important policy considerations involved. It is significant that the cases

[4]The statute has also been found to be unconstitutional on equal protection grounds in Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Phillips v. A.B.C. Builders, 611 P.2d 821, (Wyo. 1980); Norman v. Lydell, 596 P.2d 879 (Okla, 1979); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); McClanahan v. American Gilsonite Co., 494 F.Supp 1334 (D. Colo. 1980).

upholding the statute avoid any detailed examination of the rights lost by the plaintiff, the classifications made, or the justifications for the benefit of the immunity conferred upon the defendants. None including Smith v. Allen Bradley Co., supra, appear to follow the now fully enunciated intermediate standard set forth in Plyler v. Doe, supra. [6]

[6] One of the finest statements on the intermediate standard by a state court is found in the case of Fireman's Fund v. Coleman, 394 So.2d 334 (Ala. 1980). The court there states:

> "When examining the statutes which have any impact on rights protected by Section 13 (portion of Alabama Construction guaranteeing open courts and redress due every person for any injury done to him) then our scrutiny must be sharper than that exercised in cases which involve no constitutionally guaranteed rights. But the legislature must make the initial determination that the benefits provided by a statute to society or to the injured individual justify the infringement on common law rights,

Since a real review is called for in this case, perhaps some study of the situation which apparently gave rise to this statute should be considered. The protected class, and more particularly the insurors of that class, approached the legislature in this and many other states with an eye toward immunizing itself from claims in products cases. The history is that a few judgments occurred on quite old products. The insurance industry used those judgments to increase its rates and apparently exag-

6 (Con't.)
actually voluntary; is the individual quid pro quo substituted by the legislation sufficient to insure that voluntariness; is there any benefit to society at large to be achieved by such measurers; do the measures actually further the stated goals of the statute; these are questions which this court can and does validly ask when the protection of Section 13 is invoked by a party". Fireman's Fund v. Coleman, supra, at 353.

gerated the danger of liability caused by older products. According to one 1977 study, 97% of the product related accidents occurred within six years of the time the product was purchased, and over 83% of all personal injury accidents occurred within ten years manufacture.[7]

Several states have recognized that individual state tort reforms can do little to affect product liability insurance premiums which are scheduled on a national basis unlike most other forms of insurance.[8]

Architects and engineers argue that they need the immunity from suit because

[7] Insurance Services Offices, "Product Liability, Closed Claims, Survey" at 105-108, (1977). See 44 Fed. Reg. 62733.

[8] Report of the Senate Products Liability Study Committee (Ga. 1978); Governor's Task Force Report (Maine 1978). See 44 Fed. Reg. 62716.

of the difficulties they face as defendants in suits resulting from work done several years before. That may or may not be justifiable in states where strick liability in tort exists as a common doctrine, see McGovern, "The Variety, Policy and Constitutionality of Produce Liability Statutes of Repose", 30 Am U.L. Rev. 579, 589. In Virginia, however, products liability suits only in rare instances involve strict liability in tort so that the burden remains with the plaintiff in products cases. The problems of proof created by age, therefore, are magnified for the plaintiff and afford, in the natural course of things, additional protections to the defendants, not problems for them.

At the trial level plaintiff's attorney was asked if Thomas Jefferson should still be liable for the design of the Virginia

State Capitol. In response to that plaintiff would point out the many practical problems plaintiff would fact trying to sue Thomas Jefferson today. First of all, plaintiff would be faced with the questions of governmental or executive immunity that Jefferson might enjoy depending on the office he held at the time the capitol was designed. The plaintiff would then have to prove that the failure proven caused the plaintiff's injury. The nearly 200 years that have elapsed since the design of the building without incident add further common sense problems. Plaintiff would also be faced with the question of who to proceed against if Jefferson were sued individually. In short, Thomas Jefferson does not require much additional help from the General Assembly to remain safe from

suits for any negligent design in the Virginia State Capitol. But, if Thomas Jefferson was negligent in the design of the State Capitol, and his negligence caused an injury, plaintiff is at loss to see why he should not be liable for that error. All of us are liable for errors committed in the operation of automobiles and in many other ways, why should those making improvements to real estate be different? They are not, and therein lies the fallacy in Section 8.01-250. Since they are not different, the equal protection clause forbids immunizing them.

William T. Watson was standing in the wrong place at the wrong time. He was hurt because an accident occurred which was entirely predictable and foreseeable. Kellogg either negligently overlooked the possible accident or simply decided that

the risk didn't matter. In either case fundamental fairness requires Kellogg to bear the cost of destroying William T. Watson's life. The legislature may not give Watson's opportunity to recover away for Kelloggs benefit. It certainly cannot do so without making some other arrangement for Watson. It is this unconstitutional unfairness The Court is now asked to correct.

ISSUE NO. II. Does Section 8.01-250, Va. Code Ann. violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

It has already been shown that plaintiff has a right to redress for the wrong done to him. To take that from him without giving any other kind of remedy is a deprivation of due process. Reeves v. Ille Electric Co. 170 Mont. 104, 551 P.2d 647 (1976);

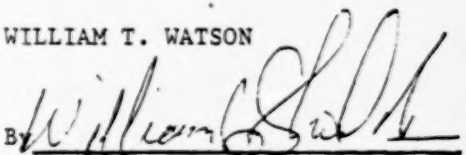
(Upholding a statute of repose where an alternative remedy was given). In Owen v. Wilson 260 Ark. 21, 537 S.W.2d 543 (1976), The Arkansas Supreme Court held that a statute of repose must allow a reasonable amount of time for plaintiff to seek redress for personal injuries.

The Alabama Supreme Court in Plant v. R. L. Reid, Inc. 294 Ala. 155, 313 So.2d 518 (1975) held that state's statute of repose unconstitutional for vagueness hence for denying due due process. The Virginia law suffers from the same infirmity. Who is and who isn't covered is impossible, to tell.

Because of the vagueness, the deprivation of a right of redress without a quid pro quo, and the failure to provide plaintiffs such as Watson an adequate time to sue, this statute of repose must fail.

For these reasons Petitioner prays his petition for Certiorari be granted.

WILLIAM T. WATSON

By 

William G. Shields

CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 28.4(c)

I hereby certify that three copies of this Petition were served by first class mail postage, prepaid, on Frank B. Miller, III, Sands, Anderson, Marks & Miller, 629 East Main Street, Richmond, Virginia 23219; and three copies were likewise served by first class mail, postage prepaid, upon the Honorable Gerald Baliles, Attorney General of Virginia, Office of the Attorney General, 101 North Eighth Street, Richmond, Virginia 23219, this 5th day of December, 1983.

William G. Shields

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1945

William T. Watson,

Appellant

v.

The M. W. Kellogg, Company,

Appellee

Appeal from the United states District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued: April 14, 1983 Decided: September 6, 1983

Before HALL and MURNAGHAN, circuit Judges, and FOX,* District Judge.

William G. Shields, (Beale, Eichner, Wright, Denton and Shields, P.C. on Brief) for

Appellant; Christopher C. Spencer (Sands, Anderson, Marks and Miller on Brief) for Appellee.

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*Hon. James c. Fox, United states District Judge for the Eastern District of North Carolina, sitting by designation.

PER CURIAM:

This is an appeal by plaintiff, William T. Watson, from the decision of the United States District Court for the Eastern District of Virginia granting the motion of defendant, the M. W. Kellogg, Company (Kellogg), for summary judgment and directed verdict. Plaintiff, a Virginia resident, brought this action seeking recovery from defendant, a Texas-based chemical plant and refinery construction company, for serious injuries sustained while working as an employee of Allied Chemical Corporation (Allied) at a plant constructed by defendant. Defendant's joint motion was granted pursuant to the applicable Virginia statute of limitations.[1] Va. Code Ann. §8.24-2

(1976 Cum. Supp.) (recordified as § 8.01-250).[2/] Finding no error in the decision of the district court, we affirm.

* It appears from the transcript of the trial court that defendant's attorney made a joint motion for summary judgment and directed verdict at the conclusion of plaintiff's evidence. It is not clear from the record whether summary judgment, or directed verdict, or both were granted. In any event, the issues before this Court are the same; and this Court's analysis is not affected thereby. For simplicity, the Court hereinafter refers to the judgment of the trial court as one for directed verdict.

1/ Va. Code Ann. § 8.24-2 (1976 Cum. Supp.)(recodified as § 8.01-250) is not a statute of limitations in the strict sense. See Hupman v. Cook, 640 F.2d 497, 498-99 (4th Cir. 1981). Often termed as a statute of repose, it "differ(s) from the conventional statutes of limitations because [it] heavily emphasize[s] the repose interest in order to protect a special class of potential litigants. [It sets] a definite accrual time unrelated to discovery of injury, and in essence den[ies] that the defendant

1/ (Con't)

owes a duty to plaintiff after a specified number of years." Dworkin, Product Liability of the 1980s: "Repose is Not the Destiny" of Manufacturers, 61 N.C.L.Rev. 33, 42-43 (1982) (footnote omitted).

2/ Va. Code Ann. § 8.24-2 provided:

> No action to recover damages for any injury to property, real or personal, or for boidly injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. This limitation shall not apply to actions agains any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage

for which the action is brought.

That statute has been amended and recodified at Va. Code Ann. § 8.01-250 It states:

> No action to recover for any injury to property, real or personal, or for boidly injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.
>
> The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or

> damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246.

The second paragraph of § 8.01-250 was added in 1973, as a reaction by the Virginia Legislature to the result in Wiggins v. Proctor & Schwartz, Inc., 330 F. Supp. 350 (E.D.Va. 1971), aff'd in an unpublished opinion on the memorandum of the district judge, 71-1952 (4th Cir., Mar. 8, 1972).

Hereinafter the statute will be referred to as Section 8.01-250.

On November 20, 1979, while assigned to Allied's ammonia plant, plaintiff was doused with both liquid and gaseous ammonia when an accidental spill occurred due to Kellogg's alleged negligence, breach of warranty, and failure to warn of unsafe or defective condition. Plaintiff suffered severe and permanent injuries as a result of the spill.

Plaintiff sued defendant on August 19, 1981, in the Circuit Court for the City of Richmond. On September 10, 1981, on defendant's petition, this action was removed to the district court for the Eastern District of Virginia on the basis of diversity jurisdiction. At the conclusion of plaintiff's evidence at trial, and upon defendant's motion, the court granted directed verdict, holding that plaintiff was barred from recovery because the five year limitation of actions for damages arising out of defective or unsafe condition of improvements to real property in Va. Code Ann. § 8.01-250 precluded plaintiff's cause of action against defendants.

The Application of Va. Code Ann. § 8.01-250

Section 8.01-250 of the Virginia Code provides that no action arising out of the defective or unsafe condition of an improvement to real property can be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of that imprvement more than five years after the performance or furnishing of such services and construction. The statute was amended, effective March 13, 1973, adding the second paragraph to the statute and thereby exclusing from the benefit of its limitation "the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property." Va. Code Ann. § 8.01-250.[3/]

Plaintiff disputes the application of Section 8.01-250 primarily on two theories;[4] (1) that the plant construction does not

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3/ See supra note 2.

4/ Plaintiff also disputes application of § 8.01-250 on the ground that the statute does not apply to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition constitutes the proximate cause of the injury. Va. Code Ann. § 8.01-250. Plaintiff argues that since he was an employee of Allied at the time of the accident, i.e., a person in possession and in control, he is covered by the terms of that exception. Plaintiff relies on Deschamps v. Camp Dressor & McKee, Inc., 306 A.2d 771 (N.H. 1973), in support of this contention. We think plaintiff misconstrues that language of the statute. The exclusion from the statute of limitation of "any person in actual possession and in control of the improvement as owner, tenant, or otherwise," as is pointed out by defendant, refers to potential defendants, (as does the preceding language of that sentence), and

plaintiff's status as an employee of Allied is not relevant to that exception.

Further, plaintiff contends that § 8.01-250 does not apply to a claim where the cause asserted is failure to warn of an unsafe or defective condition. We cannot agree. To so hold would provide a hole in the statute which could lead to its complete circumvention. See Federal Reserve Bank of Richmond v. Wright, 392 F. Supp. 1126, 1129 (E.D.Va. 1975).

constitute an improvement to real estate; and (2) that, even if the plant is an improvement to real estate because construction of the plant was not completed until some time after March 12, 1968, the amended version of Section 8.01-250 applies. Under either theory, plaintff proposes that defendants cannot invoke the limitation of the statute. We do not agree with these contentions.

The ammonia plant designed

and constructed by Kellogg is an improvement to real property. Though this term has not been defined within the context of this statute, the Virginia Supreme Court has defined improvement to mean "any development whereunder work is done and money expended with reference to the future benefit or enrichment of the premises. Eppes v. Eppes, 181 Va. 970, 988, 27 S.E.2d 164, 172 (1943). Defendant was paid $12,402.000 for its design and construction of the ammonia plant. The complex consists of a veriety of structures, and mass quantities of ammonia are produced there each day. The undoubted increase in the value of the property, as well as the utility and profit inuring to Allied

by virtue of construction of the plant, is clear; and despite plaintiff's tenuous assertion that the complex is mobile, we find the plant construction to be an improvement to real property.

Plaintiff asserts that the 1973 version of Section 8.01-250 is controlling in this case; and that pursuant to the 1973 version, defendant would be excepted from the benefit of the five-year limitation. Plaintiff argues that construction of the Allied ammonia plant was not completed until some time after March 12, 1968. If construction was com- completed after that date, the amended version of Section 8.01-250 would apply, and could mandate a different result in this case.[5/] See

Hupman v. Cook, 640 F.2d 497 (4th Cir. 1981).

Completion of the plant fell months before March 12, 1968, the plant at which the amended Section 8.01-250 would apply. On March 5, 1965, Allied and Kellogg entered into a contract wherein Kellogg agreed to design and build a plant for the production of ammonia. The plant was built according to Allied's specifications, and Allied began production of ammonia by May, 1967. The plant was officially accepted by Allied on October 26, 1967, and the last of Kellogg's employees left the plantsite on November 4, 1967. Even though defendant apparently continued performance of various duties with respect to the plant after that date,

including its obligations with respect to a one-year warranty, we do not find that such follow-up activity by defendant extended the completion date of the plant construction beyond March 12, 1968. Therefore, finding the unamended Section 8.01-250 to be applicable, we need not explore further plaintiff's contentions regarding the amended version of the statute.

5/ The amended version of Section 8.01-250 narrows the applicability of the limitation period in that it excludes manufacturers or suppliers of any equipment or machinery or other articles installed in a structure upon real property from the protection of the statute. See supra note 2. Though we are somewhat skeptical that defendant would lose the protection of the statute of limitations were we to apply the amended statute, we do not find it necessary to decide that issue since we find the unamended statute to be applicable to this case.

The Constitutionality of Section 8.01-250

Plaintiff argues that, even if his action against defendant is barred by Section 8.01-250, the district court erred in granting defendant's motion because the statute violates the Virginia and federal Constitutions.[6/] More specifically, plaintff contends that Section 8.01-250 violates Articles I and IV of the Constitution of Virginia (1971),[7/] and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6/ We find no Virginia Supreme Court cases addressing the constitutionality of Section 8.01-250.

7/ Article IV of the Constitution of Virginia (1971) provides (in relevant part):

> §14:
>
> ....
>
> The General Assembly shall confer on the courts power to [listing powers] . . . and shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals may have jurisdiction.
>
> ....
>
> The General Assembly shall not enact any local, special, or private laws in the following cases:
>
> ...
>
> (3) Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before the courts or other tribunals, or providing or changing the methods of collecting debts or en-

forcing judgments or prescribing the effective judicial sales of real estate.

...

(12) Regulating labor, trade mining, or manufacturing, or the rate of interest on money.

...

(18) Granting to any private corporating, association, or individual any special or exclusive right, privilege or immunity.

§ 15:

In all cases enumerated in the precding section and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws. Any general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of enactment of, a special, private or local law.

...No private corporation, association, or

> individual shall be specially exempted from the operation of any general law, nor shall a general law's operation be suspended for the benefit of any private corporation, association or individual.

We do not agree with plaintiff's contention that Section 8.01-250 is "special class" legislation forbidden by the Virginia Constitution, Article IV; or, on the same basis, that the statute is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution, in that it arbitrarily separates and treats differently people similarly situated. The question is whether the different treatment accorded to any person performing or furnishing the design, planning, surveying, supervision of construction or con-

struction of an improvement to real property on the one hand, and manufacturers or suppliers of any equipment or machinery and owners, tenants or other person in possession or control of any such improvement on the other hand, is violative of the equal protection provisions of the state and federal Constitutions. The former group benefits from this statute while the latter group does not so benefit.

The statute does not merit strict scrutiny analysis, as it does not focus on either a fundamental right or a suspect class. See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). See also San Antonio Independent School District v. Rodriques, 411

U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (suspect class); Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) (fundamental right). We therefore look to a rational basis analysis; and, from that, we conclude that the statute passes both state and federal constitutional muster. The classification made by the Virginia legislature must be reasonable related to the state's objective in order to be upheld. See Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957). We find that the legislation adopted by the Virginia legislature is rationally related to the legislature's interest in limiting the scope of liability for planners, surveyors and builders of an improvement to real property. The continued

access and control of the improvement available to owners, tenants and other person in possession or control and the ability of manufacturers and suppliers of equipment or machinery to maintain high quality control standards within the factory, make reasonable the different treatment accorded by the legislature. See Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715, 718-19 (Pa. 1978). We therefore conclude that the classifications resulting from this statute do not offend the "special class" clause of the Virginia Constitution or the equal protection clause of the federal Constitution.

Plaintiff further contends that Section 8.01-250 is in violation

of the due process clause of the Fourteenth Amendment to the United States Constitution, and A[ticle I, Section II of the Constitution of Virginia. Plaintiff argues that the Virginia statute effectively bars a cause of action before it accrues and, as such, denies any remedy which an injured party may have.

For those injuries which occur more than five years after completion of an improvement to real property, there is no cause of action against those who designed, planned, surveyed, supervised construction or constructed the improvement. The Virginia legislature has, in effect, prevented what might otherwise be a cause of action, from ever arising.

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There is nothing unconstitutional in the legislature so doing, so long as it does not abrogate a vested right. See Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed 221 (1929). Any potential right of action which a plaintiff may have had has been abolished by this statute prior to its vesting.

The legislature may adopt reasonable legislation which rationally relates to a legitimate concern. Here, the Virginia legislature has determined that a five year limitation should exist in order to alleviate the inherent complexities of litigation imposed by the passage of time. We do not find the balancing of interests in enacting such legislation to be

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arbitrary or capricious; and we, therefore, do not find the statute violative of due process guarantees.

Accordingly, for the reasons heretofore given, the judgment of the district court is

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 82-1945

William T. Watson, Appellant,

vs.

The M. W. Kellogg Company, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said district Court appealed from, in this cause, be, and the

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same is hereby, affirmed.

/s/ William K. Slate, II
CLERK

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UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

WILLIAM T. TATSON	CIVIL ACTION DOCKET NO. C.A. 81-0833-R
vs.	
PULLMAN-KELLOGG COMPANY	JUDGMENT

This action came on for trial before the court, United States District Judge D. Dortch Warriner presiding. The issues having been duly tried and a decision having been duly rendered, it is ORDERED and ADJUDGED that judgment is entered in favor of the defendant, PULLMAN-KELLOGG COMPANY, and that each party shall bear their respective costs of action.

Dated at: Richmond, Virginia

Date: September 22, 1982

W. FARLEY POWERS, JR., CLERK

Deputy Clerk of the Court

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